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No. 94-771

In The

Supreme Court of the United States

October Term, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the legal incidence of Oklahoma's motor fuel tax falls upon the retailer or the ultimate consumer of the fuel?

2. Whether, if the legal incidence of Oklahoma's motor fuel tax falls on the retailer, and the retailer is a federally-recognized Indian tribe conducting business in Indian country, federal law precludes imposition of the state tax directly on the tribe?

3. Whether the Treaty of September 27, 1830 precludes state taxation of the income of Chickasaw tribal members who are employed directly by the government of the Chickasaw Nation within Chickasaw Indian country, but who reside outside of Indian country?

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BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

Petitioner maintains that "[t]his case involves a 'vexing' and 'intricate' question . . . : how to 'reconcile the plenary power of the States over residents living within their borders with the semi-autonomous status of Indians living on tribal reservations.' " Petition at 7. At the very highest level of generality, that may be true – but *only* to the extent that *any* case in which the relative boundaries of state and tribal jurisdiction are in issue raises such questions. Virtually all Indian-law cases do. But when viewed at the level of specificity appropriate to a decision by this Court on a Petition for Certiorari, the case involves nothing more than a decision whether the Tenth Circuit was correct in determining that the legal incidence of Oklahoma's motor fuel tax is on the retailer of

the fuel, and whether that Circuit's interpretation of a United States/Choctaw Nation[1] treaty, see Treaty of September 27, 1830, 7 Stat. 333, was correct.

Two of Petitioner's Questions Presented are also phrased in sweeping terms (as is necessary for Petitioner to defend the certworthiness of the case). Its third Question Presented, for example, inquires broadly "whether *federal law* precludes state taxation of the income of Indians who work on tribal trust lands but live outside of Indian country." Petition at i (emphasis added). Such a formulation might mislead this Court into believing that this case presents the issue whether state taxation of the Indian-country income of tribal members (whether or not employed by their tribe)[2] who reside outside Indian country is foreclosed by the "infringement" principle of *Williams v. Lee*, 358 U.S. 217, 220 (1959).[3] It does not.

Petitioner's formulation may also suggest to this Court that this case presents the issue whether such taxation is precluded by application of the "preemption/balancing" test, as applied in cases such as *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). It does not.[4]

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[1] As Petitioner correctly notes, Petition at 7 n.2, Respondent Chickasaw Nation is the other beneficiary of that treaty.

[2] Petitioner omits from that Question the fact that in this case, all such Indians who are so employed are *members* of the Chickasaw Nation *employed directly by the tribal government*. The formation employed in *Respondent's* third Question Presented remedies that defect by reducing the question to its appropriate level of specificity. *See supra* at i.

[3] As Petitioner correctly observes, Petition at 6, this Court, in *Oklahoma Tax Commission v. Sac and Fox Nation*, 113 S.Ct. 1985 (1993), declined to resolve that question, having found the issue not properly before it on the facts of that case. *Id.* at 1992.

[4] In the Court of Appeals' opinion, that court, prior to noting the Tribe's reliance on relevant treaties, erroneously stated that "[t]he Tribe conceded in its brief on appeal that, with

Petitioner's second Question Presented – concerning the legal incidence of Oklahoma's motor fuel tax – is factbound, involving no more than an *application* of this Court's "fair interpretation" pronouncement in *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985). And its first Question Presented, which reduces to whether federal law precludes the imposition of a state tax directly on an Indian tribe with respect to its activities in Indian country, *compare* Petition at i *with supra* at i (Respondent's formulation of the issue), presents no novel question whatsoever, as this Court has long adhered to a *per se* rule precluding such taxation absent congressional authorization, *e.g.*, *Cabazon Band*, 480 U.S. at 215 n.17 (citing cases), and cases such as *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 142 & n.9 (1980), and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 481-82 (1976), expressly based their holdings on the premise that the legal incidences of the taxes there in issue were on non-Indian consumers, not the retailing tribes.

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respect to tribal member employees, this issue would be controlled by the Supreme Court's ultimate resolution in *Sac and Fox*, which had not been decided at the time the briefs were filed." *Chickasaw Nation v. Oklahoma Tax Comm'n*, 31 F.3d 964, 974 (10th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3371 (U.S. Oct. 31, 1994) (No. 94-771), *reprinted in* Petition at 20a. Nowhere in the Chickasaw Nation's brief was such a concession made. Brief for Appellant *passim*, *Chickasaw Nation*, 31 F.3d 964 (No. 92-7117). Rather, Respondent Chickasaw Nation indicated that the *Tenth Circuit's* opinion in that case – which precluded state income taxation of *all* member-earned income from tribal employment (this rendering the Chickasaw Nation's treaty-based argument *unnecessary*), *see Sac and Fox Nation v. Oklahoma Tax Comm'n*, 967 F.2d 1425, 1428-29 & n.3 (10th Cir. 1992), *vacated and remanded, Sac and Fox*, 113 S.Ct. 1985, was controlling *pending review by this Court*. Brief for Appellant at 28, *Chickasaw Nation*, 31 F.3d 964 (No. 92-7117).

Petitioner points to no inter-circuit or federal court/state court conflict, and, as the preceding paragraph (and subsequent argument) reveal, its Questions Presented raise no "important question of federal law which has not been, but should be, settled by this Court." See SUP. CT. R. 10.1(c). All such questions presented by this case are well-settled, as *Sac and Fox*, *Cabazon Band*, *Moe*, *Colville*, and *Chemehuevi*, among numerous other cases, well illustrate.

Apart from that, Respondent will establish that the Court of Appeals' decision was *correct*.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PETITIONER PRESENTS ARE PROFOUNDLY FACTBOUND, AND THEIR RESOLUTION BY THIS COURT WOULD RESOLVE NO ISSUE OF NATIONAL IMPORTANCE.

A. The First Two Questions Presented by Petitioner Rise or Fall With the Correctness of the Court of Appeals' Conclusion Regarding the Legal Incidence of Oklahoma's Motor Fuel Tax.

Since Petitioner Tax Commission's second Question Presented both logically and analytically precedes its first, Respondent will address that question at the outset. That question inquires "[w]hether the legal incidence of Oklahoma's tax on motor fuel falls upon the ultimate purchaser of the fuel." Petition at i.

Excluding its "importer" and "special fuel" provisions, see OKLA. STAT. tit. 68, §§ 601-723 (1991 & Supp. 1993), the core of Oklahoma's fuel tax scheme consumes twenty-two pages of double-column print in the unannotated official version of *OKLAHOMA STATUTES*. Both the nature of the Question Presented, and the nature of Petitioner's and Respondent's countervailing arguments concerning the legal incidence of the tax, *compare* Petition at 20-23 *with infra* at 16-21, reveal the profoundly factbound nature of the issue concerning the legal incidence of the

tax established by that complex and lengthy statutory scheme.

Moreover, although the omission was directed to the attention of Justice Breyer (as well as Petitioner) when Petitioner unsuccessfully applied to this Court for a stay of the Court of Appeals' mandate in this case, *see* Response to Application for Stay at 8 & n.6, *Oklahoma Tax Commission v. Chickasaw Nation* (No. A-227) (U.S. 1994), Petitioner again defaults on any attempt to direct this Court's attention to the motor fuel tax schemes of other states substantially identical in material respect to Oklahoma's. Although the burden is on Petitioner to demonstrate the certworthiness of this case, Respondent has researched the fuel tax schemes of the twelve states with the largest Indian populations and/or the greatest quantity of Indian country. That research reveals that none of the other states has a fuel tax scheme substantially similar to Oklahoma's in material respect: each places the legal incidence of the tax either "upstream" of the retailer (on the distributor), or "downstream" of the retailer (on the ultimate consumer).[5]

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[5] *See* ARIZ. REV. STAT. ANN. § 28-1501 (West Supp. 1993) ("every distributor shall pay to the state . . . a license tax of seventeen cents for each gallon"); CAL. REV. & TAX. CODE ANN. § 7351 (West Supp. 1994) ("For the privilege of distributing motor vehicle fuel, a license tax is hereby imposed upon distributors for each gallon. . . . "); IDAHO CODE § 63-2402(1) (1989) ("A tax is hereby imposed for the privilege of using the public highways upon the use or possession for use of gasoline. . . . "); MINN. STAT. ANN. § 296.17(1) (West 1991) ("It shall be the duty of every . . . person who uses gasoline . . . if the tax . . . has not been paid . . . to report to the commissioner . . . , and such person shall become liable for the payment of the tax."); MONT. CODE ANN. § 15-70-204 (1993) ("Every distributor shall pay . . . a license tax for the privilege of . . . carrying on business in this state in an amount equal to . . . 27 cents per gallon. . . . "); N.M. STAT. ANN. § 7-13-3 (Michie Supp. 1994) ("For the privilege of receiving gasoline in this state, there is imposed an excise tax . . .

The fact that eleven of the twelve largest Indian-country states – all save Oklahoma – have found a way to legislatively accomplish that objective counsels strongly against the grant of certiorari, since no issue of more than local import is presented by the incidence-of-the-fuel-tax question. Petitioner Tax Commission goes so far as to assert that Oklahoma could accomplish precisely its desired result "by declaring the tax to fall on the consumer and directing the Tribe to collect and remit the levy." Petition at 17. Surely this Court would not impose too great a burden on the state were it to deny certiorari and effectively require Oklahoma to amend its motor fuel tax scheme (assuming that the state legislature wishes so to do). In any event, Respondent respectfully submits that this Court does not sit to rectify the drafting errors of the Oklahoma legislature, and such may not have been errors at all, since it is more than conceivable that that legislature *intended* for the incidence of the tax to fall on the fuel

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of . . . twenty cents . . . per gallon received. . . . "); N.M. STAT. ANN. § 7-13-2.K (Michie 1993) (defining "received"); N.Y. TAX LAW § 284 (McKinney Supp. 1994) ("excise tax . . . upon motor fuel . . . imported into . . . the state. . . . or . . . if the tax has not been imposed prior to its sale in this state, which is sold by a distributor. . . . "); N.C. GEN. STAT. § 105-434 (1992) ("excise tax . . . on motor fuel sold, distributed, or used by a distributor. . . . "); *In re Newsom Oil Co.*, 273 N.C. 383, 386, 160 S.E.2d 98, 101 (1968) ("The tax imposed by G.S. § 105-434 is a privilege tax."); N.D. CENT. CODE § 57-43.1-02(2) (1993) ("The dealer shall collect the tax imposed by this section from the consumer on all sales."); S.D. CODIFIED LAWS ANN. § 10-47A-8 (Supp. 1994) ("excise tax on all motor fuel . . . sold or used"); *State v. City of Sioux Falls*, 60 S.D. 330, 332-33, 244 N.W. 365, 367 (1932) (South Dakota tax neither fuel nor sales tax, but rather tax on privilege of operating motor vehicles); WASH. REV. CODE ANN. § 82.36.100 (West Supp. 1994) ("Every person . . . who acquires any motor fuel within this state . . . and . . . in any manner uses it in this state shall, if the tax has not been paid . . . pay an excise tax at the [same] rate. . . . ").

retailer for reasons wholly unrelated to the Indian-law issues presented by the instant case.

All the above has focused on the factbound nature of Petitioner's second Question Presented. Its first apparently seeks to have this Court revisit its long line of holdings establishing a *per se* rule forbidding direct state taxation of Indian tribes regarding their Indian country activities absent congressional authorization. While Respondent will later establish that neither this Court nor any court of appeals has ever tolerated such taxation, *infra* at 21-25, four observations should suffice for present purposes. First, that issue cannot be reached without review of the factbound incidence-of-the-fuel-tax question. Second, since *as Petitioner itself notes*, *supra* at 6 (quoting Petition at 17), a stroke of the pen from the Oklahoma legislature may well resolve the entire problem, this case presents no compelling justification for revisiting firmly established and century-old caselaw. Third, Congress has been aware of this Court's *per se* rule for a *very* long time, *infra* at 24, and this Court has long been reluctant to overrule its own caselaw in nonconstitutional matters remediable by Congress upon congressional perception that the settled result was or was becoming unsatisfactory.[6] And fourth, while Petitioner erroneously contends that the decision below "threatens to cause enormous confusion about state authority in an area of great concern both to the State and to Indian tribes," Petition at 8, in reality, the reverse is true: the *per se* rule, which traces back well over a hundred years,[7] has

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[6] A recent Indian-law decision furnishes a typical example. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 510 (1991), this Court for that reason rejected an invitation from the same litigant who appears as Petitioner in the instant case to overturn decades-old tribal-sovereign-immunity caselaw.

[7] Immediately following the Civil War, this Court recognized the immunity of Indian *lands* from state taxation. *The New*

been consistently followed, and establishes a bright-line rule which has proved workable in practice. Revisiting that line of caselaw, not denying certiorari herein, would upset settled expectations, and replacing the extant bright-line rule (with which all federal courts are familiar) with *any* other principle would precipitate the doctrinal uncertainty about which Petitioner purports to be so concerned.

B. Resolution of Petitioner's Third Question Presented is Contingent Upon the Correctness of the Court of Appeals' Interpretation of the Treaty of September 27, 1830.

Petitioner's third Question Presented, which concerns the opposability of its income tax to tribally-employed members of the Chickasaw Nation, is equally factbound and uncertworthy. Two tribes – the Choctaw and Chickasaw Nations – are beneficiaries of the 1830 treaty, and Petitioner correctly notes that both the Creek Nation and Seminole Nation have similar provisions. Petition at 28. But based on diligent research, Respondent notes that those are the *only* tribes in Oklahoma with such sweeping treaty guarantees. And although Respondent has not researched the treaty histories of all the United States' more than five hundred tribes (though it has researched a substantial number), it appears that due to the unique nature of the United States' historical relation to (and removal of) the Five Civilized Tribes, the only in-force guarantees as sweeping as those provided in the 1830 treaty are enjoyed by the Choctaw, Chickasaw, Creek, and Seminole Nations. But even should Petitioner

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York Indians, 72 U.S. (5 Wall.) 761, 770 (1867); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867). Later, the "federal instrumentality" doctrine protected tribes from state taxation of numerous forms. *See generally Carpenter v. Shaw*, 280 U.S. 363, 366 (1930) (citing cases); *infra* at 23-24 (same).

be able to identify an isolated few tribes with similar in-force guarantees (a doubtful proposition), it must be recalled that the only circumstance in which the guarantee that no state shall pass laws for tribal *governments, see infra* at 26-27 (quoting 1830 treaty), becomes relevant in the context of state taxation (as is the issue herein) is with respect to income of member employees of those *governments* who reside outside of Indian country. *See, e.g., Sac and Fox,* 113 S.Ct. at 1991 (resident member employees already exempt); *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 179-81 (1973) (same). Given the radical difference between Oklahoma's fragmented and checkerboarded "reservations," *see generally Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe,* 498 U.S. 505, 511 (1991) (trust land as "reservation"), and the large and contiguous reservations of virtually all other Indian-country states, it is equally doubtful that many employees of non-Oklahoma tribal governments live "off reservation." Thus, since the treaty guarantees in question are likely limited to four Oklahoma tribes; since the factual context of the issue is also overwhelmingly limited to Oklahoma; and since the two immediately-following subpropositions will demonstrate that this case presents no additional (non-treaty) issue concerning the opposability of the state's income tax, the income-tax question, like the fuel-tax question, fails to present any issue of national import.

C. This Case Does Not Raise the Question Whether State Taxation of the Income of Tribal Members Employed Directly by their Tribe Within its Indian Country, but Residing Outside of Indian Country, Constitutes Impermissible Infringement of the Right to Tribal Self-Determination.

This Court recently declined to pass upon the question whether state taxation of the income of non-resident member employees of an Indian tribal government is

precluded by the "infringement" principle of *Williams v. Lee*, 358 U.S. 217, 220 (1959). *Oklahoma Tax Commission v. Sac and Fox Nation*, 113 S.Ct. 1985, 1992 (1993). But as in *Sac and Fox*, that question is not presented herein.

In the Court of Appeals below, Respondent intensely briefed and argued its contention that relevant treaties preempted, *see generally infra* at 11 n.9 (distinguishing "normal" preemption from "preemption/balancing"), the state income tax on non-resident member tribal employees. Brief for Appellant at 7-17, 28-29, *Chickasaw Nation*, 31 F.3d 964 (No. 92-7117); Reply Brief of Appellant at 1-3, *Chickasaw Nation*, 31 F.3d 964 (No. 92-7117). Petitioner Tax Commission responded in kind. Answer Brief of Appellee at 4-8, 19-20, *Chickasaw Nation*, 31 F.3d 964 (No. 92-7117). But "infringement" was neither briefed nor argued to the court,[8] which expressly noted that

> [w]hile in *Sac and Fox* the tribe argued – and the Court refused to decide – that the tribe's right to self-government barred the tax, *in this case the Chickasaw argue that the taxation is barred by relevant treaties between the Tribe and the United States*. . . .

Chickasaw Nation, 31 F.3d at 977, *reprinted in* Petition at 27a (emphasis added). The "infringement" question, in consequence, is not presented to this Court in the instant case.

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[8] One caveat must be added to the above observation. In its Brief-in-Chief to the Court of Appeals below, Respondent Tax Commission did assert that since "[f]ederal law does not preempt the state motor fuel tax . . . , *the Tribe must show that the motor fuel tax infringes on the right of tribal self-government.*" Answer Brief of Appellee at 13, *Chickasaw Nation*, 31 F.3d 964 (No. 92-7117) (emphasis added). But that assertion was made in the context of the *fuel* tax, not the income tax at issue in the instant subproposition. More fundamentally, in a non sequitur of considerable dimension, the Tax Commission then devoted the following three pages of its brief to arguing not "infringement," but "preemption/balancing." *See id.* at 13-16.

D. This Case Does Not Raise the Question Whether State Taxation of the Income of Tribal Members Employed Directly by their Tribe Within its Indian Country, but Residing Outside of Indian Country, is Foreclosed by Federal Common Law Preemption/Balancing Principles.

Every observation in the immediately preceding subproposition is as applicable, *mutatis mutandis*, to the "preemption/balancing" issue in the income-tax context as it was to the "infringement" question. In short, neither party briefed or argued that issue to the Court of Appeals, and that court confined its analysis to the treaty questions raised.[9]

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[9] To be sure, the Court of Appeals held that the treaties "preempted" the opposability of the state's income tax on nonresident member employees of the Tribe. *Chickasaw Nation*, 31 F.3d at 979, *reprinted in* Petition at 30a. But "normal" statutory (or treaty) "preemption," *see generally* U.S. CONST. art. VI, § 2 (supremacy clause); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986) (discussing "normal" preemption), and the "preemption/balancing" test which evolved from *McClanahan*, 411 U.S. at 172-73, *see, e.g., Cabazon Band*, 480 U.S. at 216-21, are two very different things. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983) ("Although a State will certainly be without jurisdiction if its authority is pre-empted under familiar principles of pre-emption, we cautioned that our prior cases did not limit pre-emption of state laws affecting Indian tribes to only those circumstances."). For ease of identification (and to eliminate any possible misconception concerning the nature of its argument), Respondent Chickasaw Nation has identified "normal," supremacy-clause-based preemption as "normal preemption" or "preemption" throughout this Brief, and the *sui generis* Indian-law preemption doctrine which developed from *McClanahan*, and which requires the balancing of state, federal, and tribal interests, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980), as "preemption/balancing."

II. PETITIONER HAS FAILED TO DEMONSTRATE THE EXISTENCE OF ANY INTER-CIRCUIT OR FEDERAL COURT/STATE COURT CONFLICT.

Petitioner has called this Court's attention to no such conflict, and Respondent, which has diligently researched the issue, is aware of none.

III. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. The Court of Appeals Correctly Determined that Federal Law Precludes the Imposition of Oklahoma's Motor Fuel Tax on the Chickasaw Nation.

1. *This Court has historically and consistently given great deference to courts of appeals' interpretations of state law.*

It is this Court's "practice to accept a reasonable construction of state law by the Court of Appeals 'even if an examination of the state-law issue without such guidance might have justified a different conclusion.' " *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983). Petitioner recognizes as much. Petition at 22-23.

In an attempt to navigate around that well-settled principle, Petitioner once again retreats to the highest conceivable level of generality, contending that this "Court has been vigilant in policing decisions that will disrupt the delicate and complex adjustments of sovereign power between States, Indian tribes, and the United States." Petition at 23. As Respondent earlier noted (in

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In the income-tax context, all parties exclusively argued "normal" preemption, based on the treaties, to the Court of Appeals below, and where "normal" preemption is found (as did that court), "preemption/balancing" questions need not be reached. *Mescalero Apache*, 462 U.S. at 333-34. They were not.

only a slightly different context), *supra* at 1, *virtually every Indian law case, in every state and federal court,* involves "delicate and complex adjustments" of the relative jurisdictional boundaries of those three sovereigns. Thus, Respondent's fundamental limiting principle proves too much, and is consequently no limiting principle at all.

Nor are Petitioner's subordinate limiting principles, see Petition at 23, ("in the setting presented by this case"); *id.* (discussing *Chemehuevi*), availing for purposes of evading the state-law-deference principle. As this Court is well aware, *Chemehuevi* does *not* hold that all state taxes involving tribal retailers are conclusively presumed to be consumer taxes. *Infra* at 14-15. *Neither does* Chemehuevi, *or this Court's "vigilan[ce] in policing [Indian law] decisions,"* Petition at 23, *or any meta-principle of non-Indian jurisprudence, support the proposition that all cases in which courts of appeals* (after careful analysis) *conclude that the legal incidence of such taxes are on Indian tribes are ipso facto certworthy, or the proposition that all such decisions should be summarily vacated and remanded,* see *id.* (perhaps so suggesting), *in light of* Chemehuevi. Were any permutation of the above suggestion to be adopted, the lower federal courts' role with respect to state-law questions in Indian-law cases would be an atrophied one, indeed.

2. California Board of Equalization v. Chemehuevi Indian Tribe *holds neither that all state taxes involving tribal retailers are conclusively presumed to be consumer taxes, nor that such taxes must be construed as consumer taxes where* any *ambiguity exists in a complex and lengthy state-taxation scheme.*

In *Chemehuevi,* this Court held foursquare that the legal incidence of a state tax may fall on the ultimate consumer despite the absence of any statutory provision expressly so stating, and despite the absence of any explicit "pass on and collect" provision. 474 U.S. at 11.

Rather, this Court held, "[t]he test to be derived from cases such as *Colville* and *Moe* . . . is nothing more than a *fair interpretation* of the statute as written and applied. . . ." *Id.* (emphasis added). Both in cases immediately following *Chemehuevi*, *e.g.*, *Indian Country, U.S.A. v. Oklahoma Tax Commission*, 829 F.2d 967, 984 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988) (holding that legal incidence of Oklahoma's sales tax falls "downstream" of the retailer, on the ultimate consumer, despite absence of express statutory language so providing), and in the instant case, *Chickasaw Nation*, 31 F.3d at 969, *reprinted in* Petition at 9a (holding that legal incidence of Oklahoma's beer tax falls "upstream" of the retailer, on the beer wholesaler), the Tenth Circuit has demonstrated its mastery of the *Chemehuevi* principle.

But *Chemehuevi* does *not* support any of the following three propositions, on which Petitioner implicitly relies.

First, it does not hold that all state taxes involving tribal retailers are conclusively presumed to be consumer taxes. Such an interpretation is foreclosed both by the "fair interpretation" language of *Chemehuevi* itself, 474 U.S. at 11, and by the lengths to which this Court went in *Moe* and *Colville* to establish that the legal incidences of the taxes there in question were *not* on the retailing tribes (thereby rendering the *per se* rule inoperative in those cases). *See Colville*, 447 U.S. at 142 & n.9; *Moe*, 425 U.S. at 481-82.

Second, for the same reasons, *Chemehuevi* does not hold that all state taxes *must* be construed to be consumer (or wholesaler) taxes where any ambiguity whatsoever exists in complex and lengthy state taxation schemes. This Court has made clear that absent express provisions specifically identifying the locus of the tax, such schemes must be construed *as a whole*.

Third, *Chemehuevi* does not hold that the *legal* incidence of a tax is irrelevant for purposes of application *vel non* of the *per se* rule against state taxation of Indian tribes regarding their Indian-country activities, or that the *legal*

incidence may be rendered secondary (or otherwise marginalized) by economic assumptions about whether ultimate consumers will "really" wind up "paying" the tax.[10]

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[10] *Compare* Petition at 8-9 (so arguing) *with Department of Taxation and Finance v. Milhelm Attea & Bros., Inc.*, 114 S.Ct. 2028, 2034 (1994) ("[T]he cigarette tax in *Moe* fell upon a class – non-Indians – whom the State had power to tax.") *and id.* at 2035 ("New York's regulations . . . stand[ ] on a markedly different footing from a tax imposed directly on . . . tribal organizations. . . . ") *and id.* at 2037 (emphasis and bracketed material in original) (finding that state had not "impose[d] a . . . tax *on Indian retailers*") *and Chemehuevi*, 474 U.S. at 11 (emphasis added) (focusing on "test for whether *legal* incidence of . . . tax falls on purchasers") *and Colville*, 447 U.S. at 142 & n.9 (affirming three-judge court's conclusion regarding *legal* incidence of tax) *and Confederated Tribes of the Colville Indian Reservation v. State of Washington*, 446 F.Supp. 1339, 1356-57 (E.D. Wash. 1978), *aff'd in relevant part and rev'd in part on other grounds, Colville*, 447 U.S. 134 (three-judge court expressly finding *legal* incidence-of-the-tax determination essential to avoiding *per se* rule forbidding direct state taxation of tribes regarding on-reservation activities) *and Moe*, 425 U.S. at 481-82 (expressly rejecting *tribal* contention that *legal* incidence of state tax was irrelevant since tribal retailer would "really" wind up "paying" the tax).

The "Indian trader" cases also furnish analogous precedent. In *Milhelm Attea*, this Court only last Term went to great lengths to explain that neither the cigarette tax nor any other state tax in that case imposed its *legal* incidence on exempt Indian traders. *See* 114 S.Ct. at 2034-35. *See also id.* at 2036 (discussing *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 164 (1980), and *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 691 (1965)).

3. *"Fairly interpreted," the legal incidence of Oklahoma's motor fuel tax falls upon the retailer of the fuel – in this case, the Chickasaw Nation.*

At every stage of the instant litigation below, Petitioner Tax Commission vigorously maintained that the legal incidence of Oklahoma's motor fuel tax was on the *wholesale distributor.* Answer Brief of Appellee at 8, *Chickasaw Nation,* 31 F.3d 964 (No. 92-7117) (emphasis added) ("[T]he *beer* tax shall be *paid by the wholesaler.*"); *id.* at 9 (emphasis added) (in *beer* tax context, "[t]he Tribe's sovereignty does not . . . exempt *wholesalers* from paying valid state taxes); *id.* at 10 (emphasis added) ("*Motor Fuel taxes are similar to beer taxes* in that the motor fuel *distributors* are required to . . . remit the *tax on fuel sold to retailers.*"); *id.* (emphasis added) ("[T]he Tribe cannot exempt *distributors of motor fuel* from state law."); Brief in Support of Defendants' Motion for Summary Judgment at 10-11, 15, *Chickasaw Nation v. Oklahoma ex rel. Oklahoma Tax Commission* (E.D. Okla. 1992) (No. CIV-91-310-C) (making identical arguments).

Astoundingly, for the first time before this Court, Petitioner Tax Commission now does a 180-degree pirouette, abandons the central premise of its former fuel-tax argument (which it had pursued through three years of litigation below), and urges to this Court – with equal sincerity and conviction – that the legal incidence of the motor fuel tax is *really* on the *ultimate consumer!* Petition at 20-23. In such a context, at the very least, Petitioner's representation to this Court that *"the State consistently has understood the incidence of the tax to fall on the consumer," id.* at 17 (emphasis added), lacks credibility of the most fundamental kind.

Petitioner then adds a fallback contention: that the *legal* incidence of the fuel tax *does not matter at all,* since "really," the "economic burden," *id.* at 8, 11, "falls on the

ultimate consumer," *id.* at 8. This contention, like Petitioner's new "legal incidence" contention, is also impeached by Petitioner's own earlier argumentation, which expressly noted that "the search for taxes included in the wholesale price *could look back forever*," Brief in Support of Defendants' Motion for Summary Judgment at 11, *Chickasaw Nation* (E.D. Okla. 1992) (No. CIV-91-310-C) (emphasis added), strongly suggesting that the *legal* incidence of state taxes *does* matter. (Respondent notes that for precisely the same reasons, the search could look *forward* forever, as well.)

In responding to Proposition I in the Tax Commission's Petition, Respondent will treat Petitioner's former contention that the legal incidence of the fuel tax is on the wholesale distributor as abandoned; will rebut Petitioner's new contention that its legal incidence is on the ultimate consumer (insofar as space permits) in the instant subproposition; and will rebut Petitioner's "fallback" argument that the legal incidence of the tax is irrelevant in the immediately following subproposition.

Oklahoma's motor fuel tax scheme, which places the incidence of the tax on the *retailer* (in this case, the Chickasaw Nation), differs materially from both the fuel tax schemes of other states, *supra* at 5-6 & n.5, and the cigarette-tax scheme at issue in *Chemehuevi*. Unlike the tax at issue in *Chemehuevi*, *see* 474 U.S. at 11 ("California Rev. & Tax. Code Ann. § 30107 . . . clearly seems to place on consumers the obligation to pay the tax for all previously untaxed cigarettes."), Oklahoma's scheme contains no provision making consumers as consumers responsible for payment of the tax. To the contrary, Oklahoma law specifically provides that motor fuel taxes are "remitted by a distributor *on behalf of" the retailer*. OKLA. STAT. tit. 68, § 505(C) (Supp. 1993) (emphasis added). State law also provides that the distributor is "made an agent of the state" for the collection of the tax. *Id.* § 506(a) (1991). And the "collection" is *from the retailer*. *Id.* § 505(C) (Supp.

1993) (emphasis added) ("[m]otor fuel taxes remitted by a distributor *on behalf of* a licensed *retailer*"). *Cf. id.* § 505(E) (Supp. 1993) (emphasis added) (Any *retailer or dealer* . . . shall . . . pay *to the distributor, for the benefit of the state, all taxes due* on diesel fuel . . . or may procure a distributor's license. . . . "). Again unlike the cigarette-tax scheme at issue in *Chemehuevi*, the Oklahoma fuel-tax scheme exempts the *distributor* from any obligation to remit to the state fuel taxes that are determined to be "uncollectable *by the distributor.*" *Id.* § 505(C) (Supp. 1993) (emphasis added). And since the distributor "collects" from the retailer, not the ultimate consumer, *id.*, the "uncollectability" provision (which, based on Respondent's research, is *at least* extraordinarily rare if not unique) also bears powerful witness to the fact that the tax in question is neither a wholesaler nor a consumer tax.

Still further highlighting the distinguishability of *Chemehuevi* (and the fact that the Oklahoma legislature knows how to impose consumer taxes *where it wants to*) are the similarity of Oklahoma's cigarette tax to the California tax at issue in *Chemehuevi* – and the *dissimilarity* of Oklahoma's cigarette and motor fuel taxes. Oklahoma's cigarette-tax scheme, for example, provides that there is "hereby levied upon the *sale, use, gift, possession, or consumption* of cigarettes within the State of Oklahoma a tax. . . . " OKLA. STAT. tit. 68, § 302 (Supp. 1993) (emphasis added). Oklahoma's fuel-tax scheme contains no similar language. Rather, Oklahoma law simply taxes the fuel when it is first sold by the distributor to the retail vendor. *Id.* § 502 *et seq.* (1991). Moreover, Oklahoma's cigarette-tax statutes make it a criminal offense for "*any person* to . . . have in his *possession* . . . cigarettes on which the tax . . . has not been paid." *Id.* § 306 (1991) (emphasis added). But there is no analogous provision in the state's motor fuel tax scheme. Rather, the latter scheme makes the wholesale distributor guilty of embezzlement if he

fails to pay over the taxes he collects, as the agent of the State, *from the retail vendor. Id.* §§ 505(C), 506(b) (1991 & Supp. 1993).

Apparently aware of the above (as was the Court of Appeals below), Petitioner attempts to avoid the obvious conclusion – that the tax is a retailer tax – by objections essentially of two types.

Petitioner's first category of argumentation is semantic. Tearing two clauses from the twenty-two page legislative scheme, Petitioner notes that OKLA. STAT. tit. 68, § 501(C) (Supp. 1993) states that "nothing . . . shall require a distributor, dealer *or retailer* to *collect*" the tax in certain circumstances, *id.* (emphasis added), and that *id.* § 509(a)[11] (Supp. 1993) exempts farmers from "paying" a portion of the tax. Petition at 20-21. It would undoubtedly have been more accurate from the perspective of the *totality* of the fuel-tax scheme to have made clear, as does, for example, OKLA. STAT. tit. 68, § 505(C) (Supp. 1993) (emphasis added) ("retailer or dealer . . . shall . . . *pay*"), that the distributor "collects" from the retailer, and that in light of that fact, distributors are exempted from any obligation to collect taxes *from retailers* where the ultimate purchaser is a farmer. Other states have framed their exemption and/or refund provisions with greater clarity. *See, e.g.*, MONT. CODE ANN. § 15-70-221(1) (1993) (emphasis added) (allowing certain refunds of "amount of tax paid *directly or indirectly* on the gasoline"). But as the Tenth Circuit (which has been interpreting Oklahoma statutes since shortly after statehood) was well aware, colloquialisms such as the above often occur in the state's statutory language, and among the things that *Chemehuevi* does not hold is that courts construing state taxation schemes must

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[11] Petitioner Tax Commission's citation to § 509(*b*), Petition at 21, was apparently an inadvertent attempt to invoke what is now § 501(a) after 1993 amendments to the Oklahoma fuel tax scheme. *See* 1993 Okla. Sess. Laws 667.

construe them as consumer taxes where two clauses in a twenty-two page statute create any ambiguity whatsoever. Rather, it simply requires courts to engage in "fair interpretation of the taxing statute," *Chemehuevi*, 474 U.S. at 11, and that is precisely what the Tenth Circuit, long familiar with Oklahoma law, did.

Petitioner's second category of argumentation focuses on the exemptions and refunds provided for in the Oklahoma fuel-tax scheme. Along this line, Petitioner invokes OKLA. STAT. tit. 68, §§ 509.2(A), 509.2(C),[12] 509.2(E), 509.2(F), and 527 (Supp. 1993), for the proposition that the exemptions established by those provisions demonstrate that the motor fuel tax scheme creates a consumer tax. Two defects are present in that line of argumentation.

First, the argument proves too much. Every fuel-tax scheme researched by Respondents, *see generally supra* at 5-6 n.5 (discussing schemes of largest Indian-country states), contains exemptions (or provides for refunds) of some type. *E.g.*, ARIZ. REV. STAT. ANN. § 28-1520 (West Supp. 1993); CAL. REV. & TAX. CODE ANN. § 7401 (West Supp. 1994); S.D. CODIFIED LAWS ANN. § 10-47A-46 (1989).

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[12] Petitioner also contends that the "fraudulent exemption-permit user" provision of OKLA. STAT. tit. 68, § 509.2(C) (Supp. 1993) renders Oklahoma's tax a consumer tax. Petition at 21. But the paragraph immediately preceding the paragraph Petitioner cites simultaneously provides that dealers placing diesel fuel in the tanks of such fraudulent permit users are *themselves* liable for payment of the tax. The second paragraph of § 509.2(C) no more converts the entirety of the fuel tax scheme into a consumer tax than the first paragraph of that provision conclusively establishes that the scheme is ipso facto a *retailer* tax. By Petitioner's reasoning, for example, S.D. CODIFIED LAWS ANN. § 10-47A-23 (1989), which imposes personal liability on the officers of corporations which have failed to pay applicable fuel taxes, would convert the South Dakota scheme into a tax on corporate officers.

Most likely, the fuel tax schemes of each of the fifty states so provides. Yet many of those states – as a matter of state law – characterize their own fuel-tax schemes as wholesaler, not consumer taxes. *See, e.g., supra* at 5-6 n.5. Clearly, among the numerous propositions that *Chemehuevi* does *not* support is that federal law recharacterizes such taxes as consumer taxes irrespective of a state's characterization of its own taxation scheme.

Second, Respondent notes that OKLA. STAT. tit. 68, §§ 509.2(A), 509.2(C), 509.2(E), 509.2(F), and 527 (Supp. 1993), all but the last of which were first enacted in 1993, do not replicate the colloquial drafting of *id.* §§ 501(C) and 509(a) discussed above. See *supra* at 19.

In sum, Petitioner's new argument that the legal incidence of the fuel tax is on consumers is as incorrect as the opposite argument it pursued for the three years before this case reached this Court, and the Court of Appeals, "fairly interpreting" Oklahoma's complex and lengthy scheme *as a whole*, correctly determined that its legal incidence is on fuel retailers.

4. *Federal law precludes the imposition of state taxes on Indian tribes regarding their activities within Indian country.*

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court stated unequivocally:

> *In the special area of state taxation of Indian tribes* . . . we have adopted a *per se* rule. In *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985), we held that Montana could not tax the Tribe's royalty interests in oil and gas leases issued to non-Indian lessees. . . . We stated: "In keeping with its plenary authority over Indian affairs, *Congress can authorize the imposition of state taxes on Indian tribes* and individual Indians. It has not done so often, and *the Court consistently has held that it will find the Indians' exemption from state*

> *taxes lifted only when Congress has made its intention to do so unmistakably clear.*" . . . Accordingly, it is unnecessary to rebalance . . . interests in every case.

Id. at 215 n.17.

One proposition which is unmistakably clear as a consequence of the above is that *assertions of state taxation jurisdiction over the activities of Indian tribes in Indian country are tested by a standard of judicial review which is different* from the standard applicable to assertions of state *regulatory* jurisdiction in like circumstances. In the former case, a *per se* rule precludes state *taxation* of such activities absent congressional consent; in the latter, state *regulation* may be permissible (absent "normal" preemption) pursuant to the application of the "infringement" principle or the "preemption/balancing" test.

Petitioner, which devotes over half of the body of its Petition (excluding its Statement of the Case) to arguing the "preemption/balancing" test in the motor fuel tax context, see Petition at 8-20, is naturally unsatisfied with that result. Seizing on every instance known to Respondent wherein this Court – *in dictum* – substituted "presumption" for "*per se* rule," or added the word "generally" to its formulation, *e.g.*, Petition at 12, Petitioner then characterizes the *Cabazon Band* and *Blackfeet Tribe* formulations – and their underpinnings – as *dictum*. *See, e.g., id.* at 12 (*McClanahan* limited to lands or income); *id.* at 13-14 n.7 (*Cabazon Band* formulation as dictum). But Petitioner's crabbed construction of the *per se* rule, assuming that it acknowledges the existence of the rule at all, see Petition at 11, is undercut by recent precedent, the history of the rule, and the plenary role of Congress in Indian affairs.

First, Petitioner's most fundamental thrust – that the *per se* rule does not forbid taxing Indian tribes regarding their on-reservation activities, but rather precludes only property and income taxes – is unsupported by this

Court's recent precedent. To be sure, *McClanahan* was an income-tax case, and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), which encapsulated *McClanahan's* holding, consequently did so in terms more narrow than Respondent defends herein, *id.* at 148. But *Blackfeet Tribe*, which was decided twelve years after *McClanahan* and *Jones*, did not, 471 U.S. at 765, and *Cabazon Band*, decided still later, expressly endorsed and expanded the *Blackfeet Tribe* formulation, 480 U.S. at 215 n.17.

In the interim between *McClanahan* and *Cabazon Band*, this Court had decided *Bryan v. Itasca County*, 426 U.S. 373 (1976), *Moe*, *Colville*, *Chemehuevi*, and *Blackfeet Tribe*. Unlike *Jones*, which had confined itself to an exegesis of *McClanahan's holding*, *Bryan* reached back to the principles, policies, and precedents underlying that holding, *see* 426 U.S. at 376 n.2, and in so doing, rejected the limited construction of the *per se* rule now proffered by Petitioner, *see id.* at 375-76 (emphasis added) ("Principles defining the power of States to tax reservation Indians and their property *and activities* on . . . reservations. . . . "). Nor were *Moe* and *Colville* limited to property or income taxes: rather, those cases invalidated a wide range of other state taxes including vendor license fees, sales taxes, and cigarette taxes. *See supra* at 15 n.10 (discussing this Court's reasoning in *Moe*, *Colville*, and *Chemehuevi*, and the essentiality of identifying the legal incidence of the challenged taxes so as to be able to determine the applicability *vel non* of the *per se* rule). While *Colville* and *Chemehuevi* were decided subsequent to *Bryan*, the *Bryan* Court expressly noted the expansive consequences which had already flowed from *Moe*. *Bryan*, 426 U.S. at 377. Finally, the *Blackfeet Tribe* Court, in delving into the policies and precedents supporting and defining the scope of the *per se* rule, reached back much further into history. 471 U.S. at 765 (citing *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930)).

The passage which *Blackfeet Tribe* invoked from *Carpenter* leads directly to the expansive *per se* rule which this Court historically applied based on the now-superceded "federal instrumentality" doctrine. Manifestly, the "federal instrumentality" cases did not limit the *per se* rule to lands or income. *E.g., Howard v. Gipsy Oil Co.*, 247 U.S. 503 (1918) (mem.) (gross production tax); *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U.S. 522 (1916) (tax on corporate stock); *Choctaw, Oklahoma & Gulf R.R. v. Harrison*, 235 U.S. 292 (1914) (occupation or privilege tax). Thus, both the historical and the more recent precedential context help to explain why *Petitioner has been unable to cite a single case in the more than two-hundred-year history of this Court in which it has tolerated a direct state tax* – of *any* type – *on an Indian tribe regarding its Indian-country activities absent congressional consent.*

Finally, the plenary role of Congress in Indian affairs – and this Court's longstanding recognition of that role – support the proposition that this Court should not overturn its century-old approach. No matter what formulation of the *per se* rule is adopted, both parties to this litigation apparently agree that *Congress* may abolish or make exceptions to that rule where and if it desires. Congress has been aware of the *Cabazon Band* formulation since 1987, aware of the *Blackfeet Tribe* formulation for a decade, aware of *Moe's* "incidence-of-the-tax" approach for almost two, and aware of the former consequences of the "federal instrumentality" doctrine since the nineteenth century. And as noted above, this Court has been unwilling to overrule its own caselaw in nonconstitutional matters where Congress has the capability of remedying any consequential problems which it perceives. *Supra* at 7 & n.6. That principle is carried to new heights in the instant case, wherein Petitioner further states that "it is indisputable" that an act of the *Oklahoma* legislature can *also* remedy any detrimental consequences which *it*

perceives, *without any help from this Court. See* Petition at 17.[13]

B. The Court of Appeals Correctly Determined that Relevant Treaties Preclude the Imposition of Oklahoma's Income Tax on the Income of Chickasaw Members Employed Directly by the Tribal Government Within Indian Country, Whether or Not Such Members Reside Within Indian Country.

1. *The Treaty of September 27, 1830, as confirmed by other relevant treaties and statutes, is still in force in relevant part as the supreme law of the land.*

Petitioner has silently acquiesced in the proposition that the relevant guarantees provided in the Treaty of September 27, 1830, 7 Stat. 333, are still in force as the supreme law of the land, and has confined its argumentation to the meaning of those guarantees. *See* Petition at 23-29.

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[13] The observation adduced in this paragraph also furnishes a response to Petitioner's contention that "'marketing' of the tax exemption by the tribes will take business from non-Indian retailers." Petition at 19; *see also id.* at 14-15 n.8. *Amicus curiae* Oklahoma Petroleum Marketers' Association may be expected to make a similar argument. But as has been called to this Court's attention earlier, Response to Application for Stay at 15-16 & Appendix A, *Chickasaw Nation* (No. A-227) (U.S. 1994), Respondent has itself enacted an equivalent fuel tax, and upon long and hard reflection cannot even imagine a *conceivable* motivation for other tribes not to do likewise. Moreover, should any of the other Oklahoma tribes not follow suit, even for counter-rational reasons, Congress, for the reasons described above, in balancing the competing policy interests, could remedy any problem which *it* perceives as such, *as could, by Petitioner's own argument, the Oklahoma legislature, without any help from this Court.*

2. *This Court has consistently held that applicable canons of construction require that treaties protecting tribal self-determination rights be construed in the manner most favorable to the tribe.*

E.g., County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) (citing cases); *McClanahan*, 411 U.S. at 173-74 (same).

3. *The Treaty of September 27, 1830 preempts state taxation of the income of* all *Chickasaw members employed directly by the tribal* government *within its Indian country.*

At the outset, the sole income tax (or treaty) question which this case presents to this Court must be stated with great precision: it is whether the 1830 treaty (as later reaffirmed by Congress) precludes state taxation of the income of member employees of the *government* of the Chickasaw Nation who perform their work within, but reside outside of Indian country. *Supra* at 2 & n.2, 9-11. The Court of Appeals held that it did. *Chickasaw Nation*, 31 F.3d at 975-79, *reprinted in* Petition at 24a-30a.

In relevant part, the 1830 treaty provides:

> The Government and people of the United States are hereby obliged to secure the said Choctaw Nation of Red People the jurisdiction and government of all persons and property that may be within their limits west,[14] so that no

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[14] Petitioner has attempted to employ this clause to limit the express and unequivocal guarantee which immediately follows. Petition at 26. But apart from the impact of the canons of construction on such argumentation, later cases have made clear that tribes possess sovereignty over both their territories and their members, *United States v. Wheeler*, 435 U.S. 313, 323

> Territory or State shall ever have a right to pass laws for the *government* of the Choctaw Nation of Red People and their descendants.

Treaty of Sept. 27, 1830, art. IV, 7 Stat. 333, 333-34 (emphasis added) [hereinafter "Treaty of Dancing Rabbit Creek"]. Petitioner recognizes the centrality of the term "government" in the above guarantee. *See* Petition at 25-26. Apart from the "canons of construction," *supra* at 26, and the dictionary definition of "government" (which includes both the *process* of governance and the *structure* through which governance is achieved, *see* WEBSTER'S UNABRIDGED DICTIONARY 789 (2d ed. 1983)), the historical origins of the guarantee evidence the breadth with which "government" should be construed.

Space does not permit the full replication of the argument concerning the historical context in which that guarantee was made, as presented to the Court of Appeals below. But encapsulated to the greatest possible degree, what were then known as the Five Civilized Tribes (the Choctaw, Chickasaw, Creek, Seminole, and Cherokee) "from time immemorial occupied the land that now comprises most of . . . the Southern States," GRANT FOREMAN, THE FIVE CIVILIZED TRIBES 17 (1934), and non-Indians wanted those vast lands. Some Choctaw members began to remove to the west early on, *e.g.*, *id.* at 22, and the Choctaw Nation was the first of the Five Tribes to enter into a comprehensive removal agreement. Given both the vast landholdings of the Five Tribes and the Choctaw leaders' willingness to negotiate removal in

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(1978), and this Court has held that it will not strain to implement Indian policies which Congress has now rejected, *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 527 (1986). Even as a wholly textual matter, the guarantee is provided to the tribal *government* wherever that government exercises jurisdiction, and in any event, all member employees at issue in this case performed their duties *within Chickasaw territory*.

advance of the other Five Tribes members, Congress provided the expansive guarantees contained in Article IV of the Treaty of Dancing Rabbit Creek. *Compare id. with* Petition at 28 (citing treaties with various smaller tribes, with lesser land bases, which, while containing limited guarantees precluding the application of state law to Indian *lands*, notably omit the markedly broader proscription of state laws affecting tribal *governments*) *and infra* at 28 n.15 (guarantees proved to Cherokee Nation).

Petitioner correctly recognizes that by subsequent treaty, Respondent Chickasaw Nation became a beneficiary of the Treaty of Dancing Rabbit Creek, Petition at 7 n.2, and Respondent agrees with Petitioner that the Creek and Seminole Nation treaties, see Petition at 28, are indistinguishable in material respect. Thus, four[15] of the Five Tribes share this exceptionally broad and rare, *supra* at 8-9, guarantee.

All nonresident member employees as to which the Court of Appeals found the income tax non-opposable are employed directly by the tribal *government*. To be sure, while many are employed in what might be characterized as the performance of "traditional" governmental functions, *but cf. Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 538-45 (1985) (finding that the "governmental/proprietary" distinction could not be satisfactorily drawn), others are employed in tribal enterprises. But they are all directly employed *by their*

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[15] The Cherokee Nation, the other member of the Five Tribes, entered into its removal treaty substantially later, *see* GRANT FOREMAN, INDIAN REMOVAL 229-312 (2d ed. 1953); *see generally Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and was not provided with as sweeping a guarantee as that included in the Treaty of Dancing Rabbit Creek. *Compare id.*, art. IV *with* Treaty of Dec. 29, 1835, art. V, 7 Stat. 478, 481 (guarantees provided to Cherokee Nation).

government, and in light of the historic congressional policy strongly promoting not only tribal self-determination but also self-*sufficiency*, *see, e.g., Cabazon Band*, 480 U.S. 216-17 & nn.19-20 (citing statutes and Presidential statements), Respondent respectfully urges this Court to recognize that while neither the federal government nor states regularly engage in entrepreneurial activities, *that is precisely what Congress and the President have urged Indian tribes to do.* The functions of tribal "governments," in short, are different from those of the federal and state governments. Moreover, since this Court has been unable to draw a bright-line "governmental/proprietary" distinction well into the twentieth century, *Garcia*, 469 U.S. at 538-45, it cannot be assumed that the Indian signatories to the Treaty of Dancing Rabbit Creek – *all of whom signed that document by making an "x," see* 7 Stat. 333, 342 (1830) – would have understood "government" in the constricted sense proffered by Petitioner, see Petition at 25-27, one hundred and sixty-four years ago.

As is the case with respect to the historical context, space does not permit the replication of Respondent's interpretive argument to the Court of Appeals in full. Its crux, however, is this. Respondent has treaty guarantees (which Petitioner admits are in force) precluding Oklahoma from passing laws for its "government." Excluding like guarantees provided to the Choctaw, Creek, and Seminole Nations, such guarantees go far beyond those provided by the United States to virtually all if not all other Indian tribes. Imposing the state's income tax on employees *of that government* increases the costs to and reduces the efficiency and efficacy of the Chickasaw *government*. The Court of Appeals consequently correctly determined that the tax is non-opposable to all member employees of that government, resident or nonresident, where the duties of such employees are performed for the tribal government in Indian country.

CONCLUSION

For these reasons, Respondent Chickasaw Nation respectfully requests this Court to deny the Writ herein.

Respectfully submitted,

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